

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 * * *

4 JOSHUA H. CRITTENDON,
5 Plaintiff,

6 v.

7 JOE LOMBARDO, *et al.*,
8 Defendants.

Case No. 2:17-cv-01700-RFB-PAL

**AMENDED
ORDER**

9
10 **I. INTRODUCTION**

11 Before the Court is Plaintiff Joshua H. Crittendon (“Plaintiff”)’s Motion for Temporary
12 Restraining Order (TRO), (ECF No. 3) and Motion for Preliminary Injunction (ECF No. 4). For
13 the reasons stated below, the Court DENIES Plaintiff’s motions without prejudice. The Court also
14 addresses several other motions filed by Plaintiff: a Motion for Copies of Written Transaction
15 (ECF No. 16), and a Motion for Leave and/or Stay of Time (ECF No. 39).

16
17 **II. BACKGROUND**

18 Plaintiff filed his original Complaint and Motion to Leave to Proceed in forma pauperis on
19 June 16, 2017. (ECF No. 1).¹ Plaintiff, a pretrial detainee, asserts unnecessary and excessive use
20 of force claims, as well as a claim for deliberate indifference in the denial of medical treatment,
21 alleging that Defendants assaulted him and caused him irreparable harm. Plaintiff also filed the
22 instant Motion for TRO and Motion for Preliminary Injunction on August 1, 2017, whereby he
23 asks this Court order that he be moved to another facility to get medical care. (ECF No. 3, 4). On
24 August 10, 2017, the Court held a hearing on the motions and heard representation from Plaintiff.
25 The hearing was continued to the following day; although counsel for Defendants had not yet been
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28 ¹ On December 28, 2017, the Court entered an Order granting leave to proceed in forma
pauperis and screening the Complaint. (ECF No. 30). The Complaint was filed on December 29,
2017. (ECF No. 31).

1 served, they appeared at August 11th hearing. During the August 11th hearing, the Court ordered
2 Defendant Naphcare to provide Plaintiff with access to his medical records and Defendants Joe
3 Lombardo (“Lombardo”) and the Las Vegas Metropolitan Police Department (“LVMPD”) to
4 provide Plaintiff access to certain videotape footage. (ECF No. 14). The Court scheduled a future
5 hearing on the matter, which was held on January 11, 2018. (ECF No. 35).

6 On January 31, 2018, Plaintiff filed a Motion for Leave and/or Stay of Time to Pursue
7 Counsel. (ECF No. 39). Defendants Lombardo and LVMPD filed a Response on February 14,
8 2018. (ECF No. 43).

9 10 **III. FACTUAL ALLEGATIONS**

11 The Court summarizes the allegations from the Complaint as follows. Plaintiff’s claims
12 stem from two events in which he alleges that he was assaulted by Clark County Department of
13 Corrections (“CCDC”) corrections officers. On November 15, 2016, Corrections Officer Sanchez
14 “cuffed-up” Plaintiff and grabbed him by the shirt, directing him out of his cell for a visit with his
15 attorney. As they approached the stairs, Plaintiff stopped to avoid being pushed onto the stairs.
16 Sanchez “took this as resistance,” then tripped and slammed Plaintiff to the ground. The next day,
17 Corrections Officer Brown woke Plaintiff for his medication. Plaintiff took the medication and
18 Brown told him to open his mouth. He asked Brown not to “start with him today,” implying that
19 he was uncomfortable with the request because Brown had sexual allegations against him about
20 which Plaintiff had repeatedly confronted him. Plaintiff told him “once is enough.” Brown got
21 mad and told Plaintiff, “I’ll be back.” Plaintiff claims Brown retaliated against him, returning ten
22 minutes later to move Plaintiff to a corner cell where Plaintiff could not see the television. Plaintiff
23 refused to leave. Brown called for back-up. Other corrections officers came to Plaintiff’s cell and
24 threatened him with deadly force if he did not “cuff-up.” After Plaintiff did not comply, the
25 corrections officers sprayed chemicals into his cell, causing Plaintiff to cough and choke, and stuck
26 a shotgun in the cell. As Plaintiff was holding on to his mattress, an officer fired the shotgun. The
27 shotgun malfunctioned and a rubber ball that was accidentally ejected hit Plaintiff’s finger, causing
28 it to break. The corrections officers then extracted Plaintiff from the cell and took him to the mental

1 health unit. Plaintiff was placed into a feces-smear room, stripped naked, and left on the floor
2 with no mattress. He requested to be rinsed-off because the chemicals were burning his eyes and
3 skin, and he was bleeding from his exposed finger. CCDC denied his request for at least four days.
4 Hours after the extraction, Plaintiff had an x-ray taken of his finger but did not see a doctor for two
5 months. CCDC denied him pain medication that he was prescribed. Plaintiff's alleges that his
6 finger is permanently disfigured as a result of these events. He also alleges that he suffers from an
7 underlying mental disorder, spine injury, and emotional trauma.

8 9 **IV. LEGAL STANDARD**

10 **a. Motion for Temporary Restraining Order or Injunctive Relief**

11 A preliminary injunction is "an extraordinary remedy that may only be awarded upon a
12 clear showing that the plaintiff is entitled to such relief." Winter v. Natural Res. Def. Council, Inc.,
13 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, a plaintiff must establish four elements:
14 "(1) a likelihood of success on the merits, (2) that the plaintiff will likely suffer irreparable harm
15 in the absence of preliminary relief, (3) that the balance of equities tip in its favor, and (4) that the
16 public interest favors an injunction." Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc., 758 F.3d
17 1069, 1071 (9th Cir. 2014), as amended (Mar. 11, 2014) (citing Winter, 555 U.S. 7, 20 (2008)). A
18 preliminary injunction may issue under the "serious questions" test. Alliance for the Wild Rockies
19 v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011) (affirming the continued viability of this doctrine
20 post-Winter). According to this test, a plaintiff can obtain a preliminary injunction by
21 demonstrating "that serious questions going to the merits were raised and the balance of hardships
22 tips sharply in the plaintiff's favor," in addition to the other Winter elements. Id. at 1134-35
23 (citation omitted).

24 A temporary restraining order ("TRO") may be issued without notice to the adverse party
25 only if the moving party: (1) provides a sworn statement clearly demonstrating "that immediate
26 and irreparable injury, loss, or damage will result to the movant before the adverse party can be
27 heard in opposition," and (2) sets forth the efforts made to notify the opposing party and why
28 notice should not be required. Fed. R. Civ. P. 65(b) (1). TROs issued without notice "are no doubt

1 necessary in certain circumstances, but under federal law they should be restricted to serving their
2 underlying purpose of preserving the status quo and preventing irreparable harm just so long as is
3 necessary to hold a hearing, and no longer.” Granny Goose Foods, Inc. v. Bhd. of Teamsters, 415
4 U.S. 423, 439 (1974) (citation omitted).

5 Injunctions affecting prison conditions “must be narrowly drawn, extend no further than
6 necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive
7 means necessary to correct the harm.” 18 U.S.C. § 3626(a)(2).

8 **b. Due Process Challenge to Excessive Force in Pretrial Detention**

9 A pretrial detainee alleging excessive force must show that the defendant acted with a
10 greater degree of culpability than negligence. See Kingsley v. Hendrickson, 135 S. Ct. 2466,
11 2472 (2015). (“[W]e have stated, ‘liability for negligently inflicted harm is categorically beneath
12 the threshold of constitutional due process.’”) (citation omitted). However, as to the state of mind
13 regarding the nature of the force, “a pretrial detainee must show only that the force purposely or
14 knowingly used against him was objectively unreasonable.” Id. “A court (judge or jury) cannot
15 apply this standard mechanically. Rather, objective reasonableness turns on the facts and
16 circumstances of each particular case. . . . A court must also account for the legitimate interests
17 that stem from the government’s need to manage the facility in which the individual is detained,
18 appropriately deferring to “policies and practices that in the judgment” of jail officials “are
19 needed to preserve internal order and discipline and to maintain institutional security.” Id. at
20 2473 (internal citations and quotation marks omitted).

21 In evaluating the reasonableness of force used, the Court may consider the following
22 factors: “the relationship between the need for the use of force and the amount of force used; the
23 extent of the plaintiff’s injury; any effort made by the officer to temper or to limit the amount of
24 force; the severity of the security problem at issue; the threat reasonably perceived by the officer;
25 and whether the plaintiff was actively resisting.” Id. (citations and quotation marks omitted).
26 This list, however, is not exhaustive. Id.

27 **c. Due Process Challenge to Deliberate Indifference to Serious Medical Needs**

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1 A pretrial detainee's right to be free from punishment is grounded in the Due Process
2 Clause, but courts borrow from Eighth Amendment jurisprudence when analyzing the rights of
3 pretrial detainees. See Pierce v. Cnty. of Orange, 526 F.3d 1190, 1205 (9th Cir. 2008). Although
4 the U.S. Supreme Court and the Ninth Circuit have started to apply an objectively reasonable
5 standard to determine whether a pretrial detainee's rights have been violated, those courts have
6 not fully addressed the new standard for medical claims and pretrial detainees. See generally
7 Kingsley v. Hendrickson, 135 S.Ct. 2466 (2015) (holding that an objectively reasonable standard
8 applies to a pretrial detainee's excessive force claims); Castro v. Cty. of Los Angeles, 833 F.3d
9 1060, 1071 (9th Cir. 2016) (holding that an objectively reasonable standard applies to a pretrial
10 detainee's failure to protect claims).

11 The Eighth Amendment prohibits the imposition of cruel and unusual punishment and
12 "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and
13 decency.'" Estelle v. Gamble, 429 U.S. 97, 102 (1976). A prison official violates the Eighth
14 Amendment when he acts with "deliberate indifference" to the serious medical needs of an
15 inmate. Farmer v. Brennan, 511 U.S. 825, 828 (1994). "To establish an Eighth Amendment
16 violation, a plaintiff must satisfy both an objective standard—that the deprivation was serious
17 enough to constitute cruel and unusual punishment—and a subjective standard—deliberate
18 indifference." Snow v. McDaniel, 681 F.3d 978, 985 (9th Cir. 2012), overruled on other grounds
19 by Peralta v. Dillard, 744 F.3d 1076 (9th Cir. 2014). To establish the first prong, "the plaintiff
20 must show a serious medical need by demonstrating that failure to treat a prisoner's condition
21 could result in further significant injury or the unnecessary and wanton infliction of pain." Jett v.
22 Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal quotations omitted). To satisfy the
23 deliberate indifference prong, a plaintiff must show "(a) a purposeful act or failure to respond to
24 a prisoner's pain or possible medical need and (b) harm caused by the indifference." Id.
25 "Indifference may appear when prison officials deny, delay or intentionally interfere with
26 medical treatment, or it may be shown by the way in which prison physicians provide medical
27 care." Id. (internal quotations omitted). When a prisoner alleges that delay of medical treatment
28 evinces deliberate indifference, the prisoner must show that the delay led to further injury. See

1 Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985) (holding that
2 “mere delay of surgery, without more, is insufficient to state a claim of deliberate medical
3 indifference”).

4 5 **V. DISCUSSION**

6 The Court finds that, as a threshold matter, Plaintiff has not articulated, or otherwise
7 provided, facts to support that “immediate and irreparable injury, loss, or damage will result”
8 before Defendants can be heard, such that a TRO is warranted. Fed. R. Civ. P. 65(b)(1). The Court
9 also finds that at this point in time, Plaintiff is not entitled to injunctive relief. The Court finds that
10 Plaintiff has established a likelihood of success on the merits as to his unnecessary and deadly
11 force claims. Plaintiff’s allegations regarding being shot in the hand with a rubber ball after a
12 shotgun malfunctioned indicate reckless conduct that may support his excessive force claim. As
13 to the deliberate indifference claim, however, Plaintiff has not sufficiently alleged a serious
14 medical need and failure to treat a condition. Therefore, he is unlikely to succeed on the merits of
15 this claim.

16 Furthermore, Plaintiff has not shown irreparable harm such that an ongoing injunction is
17 necessary. Plaintiff alleges that he faces continual retaliation and has been denied medical
18 treatment but has not provided sufficient facts to substantiate the retaliation claim. It is unclear
19 from his motion what retaliatory actions any particular Defendant has taken. Additionally, Plaintiff
20 seeks to be moved to another jurisdiction or facility because he fears for his life and has not
21 received necessary medical care. Plaintiff claims that his injuries after the alleged assaults on
22 November 15 and 16, 2016 were a broken finger, abrasions, and bruising on the wrists. However,
23 Plaintiff concedes that he did receive medical treatment, albeit not immediately. He admits that he
24 received x-rays of his finger after the assault and saw a hand specialist on two occasions. Plaintiff’s
25 dissatisfaction with the treatment he received, without more, does not give rise to a constitutional
26 violation meriting injunctive relief. Plaintiff has not articulated that he has an ongoing medical or
27 mental health condition requiring a specific treatment or one that would entitle him to receive a
28 particular medication other than what has already been prescribed.

1 Given the Court's findings, the remaining factors for consideration as to imposition of a
2 TRO or injunction need not be addressed at this time. Therefore, the Court denies the Motion for
3 TRO and Motion for Preliminary Injunction without prejudice. With respect to Plaintiff's more
4 recent filing, the Court denies in part the request for leave or stay, as there has not previously been
5 a deadline set for Plaintiff to file an amended Complaint. However, the Court now orders that
6 Plaintiff is given leave to file an amended Complaint **within sixty days**. Plaintiff is instructed that
7 if he chooses not to file an amended Complaint, the case will proceed with the current Complaint.
8 If Plaintiff chooses to file an amended Complaint, he is instructed to set forth factual allegations
9 regarding his constitutional challenges, against each particular Defendant. Plaintiff also alleges
10 that Defendant Williamson has not followed the Court's prior order allowing Plaintiff access to
11 his medical files for one to two hours each week. Now that Defendant Williamson has been served,
12 the Court reasserts its prior order that Plaintiff shall have access to his medical file on a weekly
13 basis. At this time, the Court denies Plaintiff's request to compel Defendant LVMPD to provide
14 him access to certain video footage.

15 16 **VI. CONCLUSION**

17 **IT IS THEREFORE ORDERED** that the Motion for Temporary Restraining Order (ECF
18 No. 3) is DENIED without prejudice.

19 **IT IS FURTHER ORDERED** that the Motion for Preliminary Injunction (ECF No. 4) is
20 DENIED without prejudice.

21 **IT IS FURTHER ORDERED** that the Motion for Copies of Written Transaction (ECF
22 No. 16) is GRANTED. The Court approves the request for transcripts of the hearings held on
23 August 10, 2017 and August 11, 2017.

24 **IT IS FURTHER ORDERED** that the Motion for Leave and/or Stay is GRANTED in
25 part and DENIED in part. If Plaintiff chooses to file an Amended Complaint, he must do so **within**
26 **sixty days**.

27 **IT IS FURTHER ORDERED** that Defendant Williamson SHALL provide the Plaintiff
28 regular (weekly for at least one to two hours) access to his ENTIRE medical file throughout the

1 pendency of this litigation. As previously ordered, failure to provide such access may lead to
2 sanctions, including monetary sanctions and up to case-dispositive sanctions.

3 **IT IS FURTHER ORDERED** that Plaintiff shall NOT file any further motions without
4 leave of the Court except for motions involving direct threats to his safety or a serious and
5 potentially life-threatening medical condition.

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7 DATED this 30th day of March, 2018.



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9 **RICHARD F. BOULWARE, II**
10 **UNITED STATES DISTRICT JUDGE**